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# In the Supreme Court of the United States

OCTOBER TERM, 1943

DE FREMERY & CO., *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

**Petition for Writ of Certiorari to the United States Court of Customs and Patent Appeals**

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# In the Supreme Court of the United States

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## Petition for Writ of Certiorari to the United States Court of Customs and Patent Appeals

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Above-named petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals, affirming in part a judgment of the United States Customs Court.

### OPINIONS BELOW

The opinions of the trial court are reported as CD 455, 6 USCCR 167, and CD 587, 8 USCCR 113. The opinion of the Court of Customs and Patent Appeals (R 39) is reported as CAD 253, 31 CCPA (Customs) ....., 138 F2d 161.

## JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered June 10, 1943 (R 53-4), and on October 4, 1943, petitioner's application for rehearing was denied (R 55). The jurisdiction of this court is invoked under section 195 of the Judicial Code, as amended, 28 USC 308. On December 29, 1943, by order of the Chief Justice the time during which the petition might be filed was extended to February 3, 1944 (R 56).

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## QUESTIONS PRESENTED

The primary question is whether various types of alcoholic beverages were upon importation taxable under a provision for "distilled spirits . . . imported into the United States," against the contention of petitioner that they are not "distilled spirits."

This question depends in turn upon whether a definition of "distilled spirits" which, when originally enacted as a part of section 4, Act of July 20, 1868, 15 Stat. 126, related only to domestic distillery products, should, by virtue of its subsequent enactment as RS 3248, be applied to imported products. Thus, in brief, the question is whether codification without material change imparts to a statute a broader scope than originally it possessed.

Petitioner seeks review of the judgment below upon the ground that this question was therein erroneously answered in the affirmative.

## STATUTES INVOLVED

The pertinent statutes appear in full in the petition and supporting brief upon the pages indicated below. They are as follows:

Act of July 20, 1868, sec. 4, c. 186, 15 Stat. 126....pp. 4-5

Revised Statutes of 1874, sec. 3248.....pp. 4, 14

Revised Statutes of 1874, sec. 3254.....p. 23

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## STATEMENT

In 1937 petitioner imported the three beverages referred to below, which had these alcoholic contents (R 42, 45): Creme de cassis, 15 percent; green menthe, 30 percent; cherry cordial, 32 percent. These articles had been produced by processes of infusion or distillation, were classified for customs purposes under the Tariff Act of 1930 as "cordials", and assessed with the appropriate duty for such articles. They were also assessed with the tax now in controversy under section 600 (a), Revenue Act of 1918, as amended by section 2, Liquor Taxing Act of 1934, as "distilled spirits." After appropriate proceedings instituted by a protest against the collector's assessment (R 5, 9), it was held in the decision below (1) that the creme de cassis was not, for tariff purposes, dutiable as a "cordial"

but rather as "fruit juices and fruit sirups . . . containing . . . . alcohol"; also (2) that, by virtue of a definition of "distilled spirits" found in RS 3248, each of these three articles was taxable under the revenue act as "distilled spirits." Consequently, according to the decision below imported rectified products, to wit, alcoholic fruit juices and alcoholic cordials, are taxable as distilled spirits.

The provisions of RS 3248 are now found in sections 2809 (b) (1) and 2800 (c), 26 USC; and in the 1934 edition of the Code, referred to in the opinion below (R 46-7), those provisions appear as sections 1158 (b) (1) and 1150 (6) (c), title 26. This law was originally enacted as a part of section 4, Act of July 20, 1868, 15 Stat. 126, and remained unchanged until incorporated in the Revised Statutes of 1874, at which time the portion appearing below in italics became RS 3248, and the remainder became RS 3282:

> Sec. 4. And be it further enacted, that *distilled spirits, spirits, alcohol, and alcoholic spirits within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirits, or be immediately, or at any other time, transferred into any other substance, either in the process of original production or by any other process;* and no mash, wort, or wash fit for distillation or the production

of spirits or alcohol shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol, or any vapor of alcoholic spirits, in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and the tax thereon paid. Every person who violates any provision of this section shall be fined for each offense not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years: Provided further, that nothing in this section shall be construed to apply to fermented liquors, or to fermented liquids used for the manufacture of vinegar exclusively. But nothing herein contained shall be construed to authorize the distillation of such fermented liquids, except in an authorized distillery.

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## RULINGS OF COURT BELOW

The court below held (R 49) that:

> . . . The last part of RS 3248, when first enacted in said Act of July 20, 1868, clearly indicates that the language thereof applied only to domestic spirits. In other words, the language "and the tax shall attach

> to this substance as soon as it is in existence as such . . .'' clearly shows that Congress at that time had in mind domestic liquors.

Nevertheless, it was concluded (R 49) that:

> . . . RS 3248, when imported into the act, was intended by Congress to define ''distilled spirits, spirits, alcohol, and alcoholic spirits'' wherever such terms appeared in the act. Such is clear from the language of said section reading ''within the true intent and meaning of this act,'' *referring* to the act as a whole, i. e., *to all the Revised Statutes.*

Therefore, regardless of the fact that RS 3248, when first enacted as a part of section 4 of the Act of 1868, ''clearly . . . applied only to domestic spirits'' (R 49), and notwithstanding that the entire Act of 1868 ''had no relation whatever to *imported* distilled spirits'' (R 49), nevertheless it was the court's opinion that by virtue of its incorporation into the Revised Statutes as RS 3248, the definition in the Act of 1868 acquired a broader scope, i.e., it became applicable to *foreign* spirits. As to this the court said (R 49):

> . . . For example, for customs purposes (import duty) it (RS 3248) defined ''spirits'' when used in a phrase like ''Brandy and . . . other spirits manufactured or distilled from grain,'' etc. See R. S. 2504, schedule D.

Consequently the court concluded as to the scope of RS 3248 (R 49):

> It is our view that when Congress enacted RS 3248, it was then intended to affect those things mentioned

> in that act (the Revised Statutes) or other articles to which it might later apply. The section remained unrepealed throughout the years. It afforded a proper definition of distilled spirits, whether imported or domestic. The mere fact that the latter portion of the provision has to do only with domestic liquors does not change the situation with regard to the first portion thereof. The definition in the first part of the section is complete, and it is our view that when Congress enacted the revenue acts above referred to [acts of 1917 and 1918], levying an internal revenue tax on *imported* distilled spirits, as well as domestic spirits, it had in mind the applicability of the definition in RS 3248, which was unrepealed and in full force and effect.

The court then determined the issue by a specific and exclusive reliance upon RS 3248, as follows (R 50):

> It is clear to us that all three of the imported articles, containing alcohol as they do, fall within the term "including all dilutions and mixtures of this substance." Certainly alcohol has been mixed with other substances to make the imported products.

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**REASON FOR GRANTING THE PETITION**

It is submitted that the decision below should be reviewed because it decided an important question of federal law, i. e., the taxable status of imported products containing alcohol, in a way which conflicts with principles of statutory construction which have been settled by decisions of this court. In particular it is asserted that the court failed:

1) To consider RS 3248 and RS 3282 (sec. 4, act of July 20, 1868) as one law, as originally enacted in 1868.

2) To construe that portion of RS 3248 which is now pertinent in harmony with the remainder and with the context.

3) To observe and apply Congressional intent as originally manifested in the act of 1868.

Also, petitioner contends that the court erred by affirmatively holding that:

4) The words "this act," as found in RS 3248, referred to the act of 1874 rather than that of 1868, and therefore defined "spirits" wherever that word appeared in said act of 1874.

The court's position in respect to point 1 is contrary to the principle of *Buck Stove Co. v. Bickers,* 226 US 205, holding that separation in the Revised Statutes of several parts of an existing statute did not change that statute's meaning. Likewise, *Anderson v. Pacific Coast Steamship Co.,* 225 US 187, held that an intention to alter the scope and purpose of an existing law cannot be imputed to Congress because in the Revised Statutes it placed in two separate sections portions of what was a single section of the original act.

As to points 2 and 3 it may be observed that as found by the court (R 49) the act of 1868 "had no relation whatever to imported distilled spirits," and that the last part of RS 3248 "when first enacted in 1868 . . . clearly shows that at that time Congress had in mind domestic

liquors." Consequently the application of RS 3248 to foreign products was in disregard of Congressional intent and contrary to the decision in *McDermott v. Wisconsin,* 228 US 115, 128, that an act must be considered and construed "in the light of the purpose and of the power exerted in its passage by Congress."

Also, the court's separation of RS 3248 into two parts, i. e., the definition and the "latter portion," and the court's application of the definition to a subject which it found was not within the purview of the balance of the section, and which clearly was not within the purview of the original law was not only in conflict with decisions cited above under point 1, but also in conflict with those cited below under point 4 holding that a revised statute is to be construed in accordance with the intent of Congress at the time of its original enactment.

Furthermore, the decision is contrary in principle to *Thompson v. US,* 142 US 471, involving a question of whether distilled spirits lost by evaporation were subject to internal-revenue tax. There this court, in considering several pertinent statutes and statutes *in pari materia,* including RS 3248, now under consideration, quoted that statute in the following manner, thus evidencing its understanding that the section not only relates to products of domestic distilleries, but also that it should be construed in its entirety (p. 474, italics quoted):

> . . . By revised Statute 3248, distilled spirits are defined to be "that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses or sugar, etc. . . . *and the tax shall*

*attach to this substance as soon as it is in existence as such.''*

As to point 4, namely, that the words "this act" as found in RS 3248 meant the act of 1874 and therefore defined the "distilled spirits" wherever that term was used in the Revised Statutes, the decision is clearly contrary to the principle that a revised statute is to be construed in accordance with the intent of Congress at the time of its original enactment. *Doyle v. US,* 94 US 50; *US v. Averill,* 130 US 335; *Page v. Burnstone,* 102 US 664; *US v. Phelps,* 107 US 320; *Crenshaw v. US,* 139 US 99, and *US v. Bathgate,* 246 US 220. See also 11 Encyc. Sup. Ct. Rep. 155, stating in part:

> Where there is no change in phraseology . . . the Revised Statutes are to be construed as having the same meaning as the original act, although the act has been repealed, and are to be construed in the light of history and circumstances existing at the time of enactment of the act, and the judicial and practical construction placed thereon.

Therefore, as it is manifest that section 4 of the Act of 1868 did not define distilled spirits for any purpose other than in connection with that act, and, in this regard, as shown by the annexed brief, extended only to domestic distillery products, it follows that the decision below, being predicated upon an erroneous construction of RS 3248, is erroneous.

## CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

San Francisco, January 27, 1944.

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